

Report on Medicare Compliance Volume 30, Number 19. May 17, 2021 DOJ Recovers Medicaid Dollars From Facility Over COVID-19 Practices

By Nina Youngstrom

In a new take on enforcement in COVID-19 times, the U.S. Attorney's Office for the Northern District of Iowa said May 10^[1] that it has entered into a settlement agreement with a Texas-based long-term care company over the infection control practices at one facility.

Care Initiatives agreed to repay the federal government \$214,200 in connection with Medicaid funds for patient stays at Dubuque Specialty Care (DSC), a long-term care (LTC) facility in West Des Moines, Iowa, from April 14, 2020, to July 1, 2020, according to the settlement. At that time, some residents tested positive for COVID-19 and/or were suffering from the infection, the settlement says. "The United States alleges that DSC's practices surrounding COVID-19 during this period—including but not limited to allegedly deficient procedures and criteria for screening symptomatic employees—entitle the United States to restitution for the federal share of money paid from Medicaid for the period," the settlement states. The federal government is recovering what's known as "federal financial participation," not the entire Medicaid payment. Care Initiatives didn't admit liability in the settlement.

It's somewhat unusual that the consequences for the LTC facility's alleged COVID-19 infection failures were pursued by the Department of Justice (DOJ) instead of CMS through the survey and certification process, which is the norm, said attorney Judy Waltz, with Foley & Lardner in San Francisco. "CMS could have cited them for infection control deficiencies and required a corrective action plan," she noted. "Had they gone through CMS instead of DOJ, this would have been reflected on the facility's record for future enforcement actions and survey history."

It's unclear whether recouping money for alleged infection control failures will link back to the LTC facility's survey history "to address the bigger picture of compliance with the Medicare conditions of participation and state licensing laws," Waltz said. "This goes back to the continuing discussions about the underlying distinction between the conditions of participation and the conditions of payment. Here the government went with payment. Going with survey history might have had more impact long term for patients." She noted the Care Initiatives settlement amount is a straight repayment, with no fines or penalties. "However, there may be additional scrutiny from CMS with respect to the covered conduct that is not reflected in this DOJ settlement document," Waltz added.

CMS Has New COVID-19 Penalties

CMS recently got an additional specific authority to fine LTC facilities for COVID-19 infection control deficiencies. In its COVID-19 interim final rule published in the Sept. 2 *Federal Register*,^[2] CMS included a provision requiring long-term care facilities to test residents and staff. "Facilities that do not comply with the testing requirements in [42 C.F.R. § 483.80(h)] will be cited for noncompliance at F886. Additionally, enforcement remedies (such as civil money penalties) will be imposed based on the resident outcome (i.e., the scope and severity of the noncompliance), in accordance with Chapter 7 of the State Operations Manual," according to an Aug. 26 memo^[3] from the CMS Survey and Certification Group.

When they survey for compliance, surveyors now are required to “sample three staff, including at least one staff member who was confirmed COVID-19 positive or had signs or symptoms consistent with COVID-19 (if this has occurred in the facility), for purposes of determining compliance with infection prevention and control national standards such as exclusion from work, as well as screening, testing, and reporting,” according to the *Long Term Care Survey Process (LTCSP) Procedure Guide*.^[4]

In a statement, Care Initiatives said its “recent collaboration with the Federal government is an example of the company’s mission and core values. As a not-for-profit healthcare provider, Care Initiatives takes pride in working hand-in-hand with all levels of government.” CEO Mike Beal added that “Care Initiatives remains focused on providing quality care for residents and their families.”

Care Initiatives and Care Initiatives Hospice run 58 skilled nursing, rehabilitation, Alzheimer’s/dementia, assisted living and hospice locations in Iowa.

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¹ Department of Justice, U.S. Attorney’s Office for the Northern District of Iowa, “Dubuque Care Facility’s Owner Agrees to Repay Federal Medicaid Funds to Resolve Allegations Relating to COVID-19 Screening Procedures,” news release, May 10, 2021, <https://bit.ly/3w6mJy2>.

² Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed. Reg. 54,820 (September 2, 2020), <https://bit.ly/3onKFu4>.

³ CMS, “Interim Final Rule (IFC), CMS-3401-IFC, Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency related to Long-Term Care (LTC) Facility Testing Requirements and Revised COVID-19 Focused Survey Tool,” memorandum, August 26, 2020, <https://go.cms.gov/35L1rMo>.

⁴ CMS, *Long Term Care Survey Process (LTCSP) Procedure Guide*, February 6, 2021, <https://go.cms.gov/3y9wAF0>.

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